

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 01-2178 (JAG)
)	
Caribbean Airport Facilities, Inc.)	
Anthony Tirri, as President)	
Defendants.)	

CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Army Corps of Engineers (“Corps”), filed the Complaint herein against Defendants, Anthony Tirri as President of Caribbean Airport Facilities, and Caribbean Airport Facilities, Inc (collectively, “Defendants”), alleging that Defendants violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. §1311 (a);

WHEREAS, the Complaint alleges that Defendants violated CWA Section 301 (a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States at three sites located within the confines of the Luis Muñoz Marín International Airport in Carolina, Puerto Rico (the “CAF Sites I, II, and III”, or “CAF Sites”) and more fully described in the Complaint, without authorization by the United States Department of the Army (the Corps);

WHEREAS, the Complaint seeks (1) to enjoin the discharge of pollutants into waters of the United States in violation of CWA Section 301 (a), 33 U.S.C. §1311 (a); (2) to require Defendants, at their own expense and at the direction of Corps, to restore and/or mitigate the damages caused by

their unlawful activities; and (3) to require Defendants to pay civil penalties as provided in 33 U.S.C. §1319(d);

WHEREAS, on February 2, 1993, a Notice of Non-Compliance was issued to Defendants for failing to comply with the terms and conditions of a permit number 86IPM-20959 on July 15, 1987 (“1987 Permit”);

WHEREAS, the 1987 Permit authorized Defendants to fill 16 acres of mangrove wetlands within the confines of the Luis Muñoz Marín International Airport (“Airport”), in the area where phase I of the Defendants’ facility was to be constructed (“CAF I Site”), however, after filling the 16 acres of mangrove wetlands authorized by the 1987 Permit, Defendants filled an additional 13 acres of mangrove wetlands not authorized by the 1987 Permit;

WHEREAS, the 1987 Permit also included, inter alia, special conditions requiring by way of on-site mitigation that Defendants create 22 acres of mangrove wetlands east of one of the runways at the Airport, however Defendants failed to comply with the mitigation requirements of the 1987 Permit, creating only 15.84 acres of mangrove wetlands onsite;

WHEREAS, on November 20, 1995, a second Notice of Non-Compliance was issued to Defendants for failing to comply with the terms and conditions of permit number 199250177(IP-JG) issued on March 14, 1994 (“1994 Permit”), authorizing the filling of 25 acres of wetlands in the southern portion of the Airport where phase II of the CAF facility was to be built (“CAF II Site”);

WHEREAS, after filling the 25 acres of wetlands authorized by the 1994 Permit, Defendants filled an additional 3 acres of wetlands not authorized by the 1994 Permit;

WHEREAS, the 1994 Permit included, inter alia, special conditions required by way of mitigation that Defendants create 4.42 acres of mangrove wetlands at the CAF II Site, and 27.5 acres

of forested, herbaceous, wetlands off-site, however, Defendants failed to comply with the on-site mitigation requirements of the 1994 Permit, creating only 3.22 acres of wetlands on-site;

WHEREAS, Defendants complied with the offsite mitigation requirements of the 1994 Permit, creating 36.38 acres;

WHEREAS, on July 22, 1999, a third Notice of Non-Compliance and Cease and Desist was issued to Defendants for the discharge of fill material into 3 acres of wetlands without a permit in an area adjacent to CAF I in the north eastern area of the airport, where phase III of Defendants' facility ("CAF III") was proposed for construction;

WHEREAS, the Parties agree that, upon entry of this Consent Decree, the Corps will: (1) modify the existing permits for the CAF I and CAF II sites to legalize the unauthorized discharges of fill material into the CAF I and II sites; and (2) modify the mitigation requirements in those permits so that the excess off-site wetlands mitigation performed by Defendants will be accepted as meeting mitigation requirements for those permits;

WHEREAS, the Parties agree that, upon entry of this Consent Decree, the discharge of fill material into CAF III, as described in the Complaint and the diagram attached at Appendix A, will be authorized by the Corps by separate letter pursuant to Nationwide Permit Number 32;

WHEREAS, the Parties further agree that this authorization is not intended to alter or modify the Defendants' requirements to obtain a permit from the Corps before discharging any dredged or fill material in any waters of the United States;

WHEREAS, this Consent Decree is intended to constitute a complete and final Settlement of the United States' claims under the CWA set forth in the Complaint regarding the CAF Sites;

WHEREAS, the United States and Defendants agree that settlement of this case is in the public

interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA against Defendants in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 404 of the CWA, 33 U.S.C. § 1344.

2. Venue is proper in the District of Puerto Rico pursuant to CWA Section 404, 33 U.S.C. §1344, and 28 U.S.C. §1391(b) and (c), because the Defendants conduct business in this District, the subject property is located in this District, and the causes of action alleged herein arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon Defendants, their officers, directors, agents, employees and servants, and their successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with any of the Defendants whether or not such person has notice of this Consent Decree. In any

action to enforce this Consent Decree against a Defendant, the Defendant shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm or corporation acting in concert or participation with the Defendant to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in any of the CAF Sites (as better described in the Complaint and incorporated herein by reference) shall not alter or relieve Defendants of their obligation to comply with all of the terms of this Consent Decree. At least fifteen (15) days prior to the transfer of ownership or other interest in any of the CAF Sites or any development carried out by Defendants within the confines of the Luis Muñoz Marín International Airport, Carolina, Puerto Rico, the party making such transfer shall provide written notice and a true copy of this Consent Decree to its successors in interest and shall simultaneously notify the Corps and the United States Department of Justice at the addresses specified in Section X below that such notice has been given. As a condition to any such transfer, the Defendant making the transfer shall reserve all rights necessary to comply with the terms of this Consent Decree.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint against the Defendants under CWA Section 301 concerning the CAF Sites.

7. Defendants' obligations under this Consent Decree are joint and several.

8. Except as in accordance with this Consent Decree, Defendants' and Defendants' agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing

regulations.

9. The parties acknowledge that Nationwide Permit 32, found at 61 Fed. Reg. 65,913 (Dec. 13, 1996), authorizes any fill that was placed as of July 22, 1999, in the areas identified in the Appendix, to remain in place, subject to the conditions provided in the Nationwide Permit and this Consent Decree. The parties further acknowledge that Nationwide Permit 32 (61 Fed. Reg. 65,913), authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any such discharge of dredged or fill material necessary for work required by this Consent Decree shall be subject to the conditions of the Nationwide Permit and this Consent Decree.

10. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law, except as stated herein below. Nothing in this Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the Corps' ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

11. This Consent Decree in no way affects or relieves Defendants of their responsibility to comply with any applicable federal, state, or local law, regulation or permit.

12. This Consent Decree in no way affects the rights of the United States against any person not a party to this Consent Decree.

13. The United States reserves any and all legal and equitable remedies viable to enforce the provisions of this Consent Decree and applicable law.

14. Nothing in this Consent Decree shall constitute an admission of fact or law

by any party.

IV. CIVIL PENALTIES

15. Defendants shall pay a civil penalty to the United States in the amount of three hundred thousand Dollars (\$300,000.00), within 30 days of entry of this Consent Decree. Defendants will pay interest on the unpaid amount in accordance with the statutory judgement rate provided in 28 U.S.C. §1961.

16. Defendants shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing Corps file numbers, (86IPM-20959; 199250177; and 199350162) Jacksonville District, and the DOJ case number 90-5-1-1-05837. Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Puerto Rico. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

17. Upon payment of the civil penalty required by this Consent Decree, Defendants shall provide written notice, at the addresses specified in Section X of this Consent Decree, that such payment was made in accordance with Paragraph 15.

18. Civil penalty payments pursuant to this Consent Decree are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. §1.162-21 and are not tax deductible expenditures for purposes of federal law.

V. RESTORATION, MITIGATION, PRESERVATION, INJUNCTIVE RELIEF

19. All fill placed by Defendants on or before July 22, 1999, in the CAF Sites will remain in place. Upon final approval of this Consent Decree, the Corps will modify Defendants'

existing permits for the unauthorized discharge of fill material into the CAF I and II sites, and issue an authorization by means of Nationwide Permit Number 32 for the discharge of fill material into the CAF III Site. Defendants shall file whatever other permit applications are necessary for the future discharge of dredged or fill material. The filing of said application and its acceptance by the Corps will not be construed as requiring the Corps to grant said permit, but merely to process the same.

20. The Defendants are hereby permanently enjoined from taking any action, or causing others to take any actions which result in the discharge of dredged or fill material into waters of the United States, as defined by the CWA and regulations promulgated thereunder, except as in compliance with a permit issued pursuant to the CWA section 404(a), 33 U.S.C. §1344(a).

21. Defendants shall allow the Corps, upon prior notification, and at reasonable times with proper identification, to enter onto the property owned by or under the control of Defendants within the confines of the Luis Muñoz Marín International Airport at Carolina, Puerto Rico for purposes of monitoring compliance with the terms and conditions of this Consent Decree.

22. The mitigation already performed off site by the Defendants at the Hoyo Mulas mitigation site in Carolina, Puerto Rico will be counted towards the on-site mitigation requirements for the 1987 Permit (permit number 861PM-20959); the 1994 Permit (permit number 199250177); and the unauthorized fill placed at CAF III. This mitigation cannot be claimed as mitigation for any other future permit application filed by Defendants, their successors or assigns, or any other third party. All on-site and off-site mitigation performed pursuant to this Consent Decree will remain in its natural condition and cannot be altered, modified, or impacted by the Defendants, their successors or assigns, or third parties.

23. To ensure that all parcels of land identified in Appendix B remain undisturbed,

Defendants shall, within 15 days of entry of this Consent Decree, provide the property owner, the Puerto Rico Ports Authority, a certified copy of this Consent Decree.

VI. NOTICES

24. Any request for modification of the contents of this Consent shall be to the Corps through motion to the Court. Notice to be provided to the Corps through the address provided herein.

VII. DISPUTE RESOLUTION

25. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendants affected by the dispute to attempt to resolve such dispute. The period for negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Defendants cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations period, the Defendants file a petition with the Court seeking resolution of the dispute. The petition shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the petition and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

26. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may petition the Court for a

resolution of the dispute prior to the expiration of the thirty (30) day period. The Defendants shall have fourteen (14) days to respond to the petition and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

27. The filing of a petition asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendants under this Consent Decree, except as provided in Paragraph 30 below regarding payment of stipulated penalties.

VIII. FORCE MAJEURE

28. Defendants shall perform the actions required under this Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendants, including their employees, agents, consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, inter alia increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state or local permits.

29. If Defendants believe that a Force Majeure event has affected Defendants' ability to perform any action required under this Consent Decree, Defendants shall notify the United States in

writing within seven (7) calendar days of the event at the addresses listed in Section X. Such notice shall include a discussion of the following:

- A. what action has been affected;
- B. the specific cause(s) of the delay;
- C. the length or estimated duration of the delay;
- D. any measures taken or planned by the Defendants to prevent or minimize the delay and a schedule for the implementation of such measures.

Defendants may also provide to the United States any additional information that they deem appropriate to support their conclusion that a Force Majeure event has affected their ability to perform an action required under this Consent Decree.

30. If the United States determines that the conditions constitute a Force Majeure event then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Defendants shall coordinate with EPA to determine when to begin or resume the operations that had been affected by any Force Majeure event.

31. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section VII of this Consent Decree.

32. Defendants shall bear the burden of proving (1) that the noncompliance at issue was caused by circumstances entirely beyond the control of Defendants and any entity controlled by Defendants, including their contractors and consultants; (2) that Defendants or any entity controlled by Defendants could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

IX. STIPULATED PENALTIES

33. After the entry of this Consent Decree, if Defendants fail to timely fulfill any requirement of the Consent Decree, then Defendants shall pay a stipulated penalty to the United States. Unless reduced by the United States at its discretion, or reduced by the Court upon motion as discussed below, the amount of such penalty shall be as follows:

- | | | |
|----|---|---------------------|
| A. | For Day 1 up to and including
Day 30 of non-compliance | \$5,000.00 per day |
| B. | For Day 31 up to and including
60 of non-compliance | \$10,000.00 per day |
| C. | For Day 61 and beyond
of non-compliance | \$15,000.00 per day |

Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

34. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section VII and/or the Force Majeure provisions in Section VIII shall be resolved upon petition to this Court as provided in Paragraph 23.

35. The filing of a petition requesting that the Court resolve a dispute shall stay Defendants' obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Defendants do not prevail on the disputed issue, stipulated penalties shall be paid by Defendants as provided in this Section.

36. To the extent Defendants demonstrate to the Court that a delay or other non-

compliance was due to a Force Majeure event (as defined in Paragraph 25 above) or otherwise prevail on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

37. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the Statutory judgment interest rate provided for in 28 U.S.C. §1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

38. Defendants shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing Corps file number 199250177(NC-DD) and the DOJ case number 90-5-1-1-05837. Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Puerto Rico. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendants shall provide written notice, at the addresses specified in Section X of this Decree.

X. ADDRESSES

39. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

TO THE ARMY CORPS OF ENGINEERS:

Noel Acevedo Méndez
Assistant District Counsel
Antilles Office, Jacksonville District
CORPS
400 Fernández Juncos Ave.
Puerta de Tierra
San Juan, PR 00901

TO THE UNITED STATES DEPARTMENT OF JUSTICE:

Section Chief
Environmental Defense Section
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

TO THE US ATTORNEY, PUERTO RICO DISTRICT:

Assistant US Attorney
U.S. Department of Justice
Room 452
Federal Building
Chardón Street
Hato Rey, PR 00919

TO DEFENDANTS:

Anthony Tirri, President
Caribbean Airport Facilities, Inc.
150 Sector Central, Suite 3
Carolina, PR 00979

Lidia Lizarribar, Esq.

XI. COST OF SUIT

40. Each party to this Consent Decree shall bear its own costs and attorney's fees in this action. Should Defendants subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendants shall be liable for any costs or attorney's fees incurred by the United States in any action against Defendants for noncompliance with or enforcement of this

Consent Decree.

XII. PUBLIC COMMENT

41. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendants agree to entry of this Consent Decree without further consent.

XIII. CONTINUING JURISDICTION OF THE COURT

42. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction, or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XIV. MODIFICATION

43. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendants and approved by the Court.

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2000.

UNITED STATES DISTRICT JUDGE

ON BEHALF OF THE UNITED STATES:

DATED: _____

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment and Natural Resources Division

MELAINA A. WILLIAMS
Environmental Defense Section
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-0375

FOR DEFENDANT

DATED: _____

ANTHONY TIRRI, PRESIDENT
CARRIBEAN AIRPORT FACILITIES, INC.
Sector Central, Suite 3
Carolina, PR 00979